



DIGEST

The ***DIGEST*** contains summaries of recent orders issued by the United States Merit Systems Protection Board.



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**UNITED STATES MERIT SYSTEMS
PROTECTION BOARD**

Washington, D.C. 20419

United States Merit Systems Protection Board

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CASE SUMMARIES:

ADVERSE ACTIONS

KAREN S. BARNETT v. DEPARTMENT OF INTERIOR (Docket No. DE07528010142) May 4, 1981

Appellant was suspended for an indefinite period not to exceed six months, based on charges that she had destroyed government and personal property, had made threats against coworkers, and because several co-workers felt that her continued presence at the work site constituted an immediate threat to their well being. In the initial decision, the presiding official reversed the agency's action.

The agency filed a petition for review, alleging that the presiding official erred by determining that the agency did not provide sufficient evidence to support its charges, and arguing that its reliance upon the notice of proposed suspension was sufficient to support its action because appellant did not rebut those charges. It also contended that the presiding official erred in determining that the proposal notice was so devoid of specifics as to constitute harmful error under 5 C.F.R. 1201.56(c)(3).

The Board previously held that the purpose of an advance notice is to apprise an employee of the charges against him or her, and the notice does not constitute evidence of charges contained therein. The Board said that the fact that appellant failed to deny the charges in the advance notice was inconsequential. The Board noted that appellant had no burden to disprove the charges against her and did not relieve the agency of its burden of proof by stipulating to the truth of the charges. The Board noted that it carefully considered the agency's other arguments and concluded that they were merely statements of the agency's disagreements with the presiding official's conclusions, and failed to demonstrate that those conclusions were erroneous.

Accordingly, the Board denied the petition for review and ordered the agency to furnish evidence of compliance of the initial decision.

WALTER BOYLING v. DEPARTMENT OF THE ARMY (Docket No. SF075209216) May 20, 1981

Appellant's agency had accepted and processed a form purported to effect appellant's resignation. In the initial decision, the presiding official determined that appellant had not prepared, signed, or submitted the resignation form, and he found that appellant had been involuntarily removed. The presiding official reversed the agency's action on the basis of harmful error.

The agency's petition for review asserted that the appellant's appeal was untimely filed and disputed the presiding official's interpretation of the evidence.

The Board denied the petition for review. It found the agency's claim that the appeal was untimely filed to be without merit. In its petition, the agency argued that the presiding official erred in reversing the action partly on the basis of his analysis of the handwriting on the resignation statement because the presiding official was not a qualified handwriting expert. The Board found that the presiding official did not err in comparing the writing on the resignation form with appellant's handwritten submissions, or in making the factual determination that someone other than appellant had prepared the form.

The Board agreed with the presiding official's conclusion that appellant did not resign from his position, noting that the issue in this case was not whether the agency had a reasonable basis for believing that appellant had resigned, but, rather, whether or not appellant had, in fact, resigned.

JAMES E. CARTER v. DEPARTMENT OF THE NAVY (Docket No. DC07528010065) May 7, 1981

Appellant appealed what he alleged was an involuntary resignation from the Department of the Navy. He alleged that his resignation had been submitted in reliance on an agreement between himself and agency officials that he would be allowed to resign without prejudice and with a clean record. The Notice of Personnel Action issued by the agency noted that appellant resigned after receiving written notice of proposed removal for unexcused tardiness.

In the initial decision, the presiding official found that the agency had made an agreement with the appellant and had failed to effect the agreement, and that appellant's resignation was involuntary. The presiding official concluded that no harm accrued to appellant and ordered the agency to comply with its original agreement.

Appellant petitioned for review. He argued that the proper relief was reinstatement and that the presiding official should have allowed certain areas explored in discovery, and that he should be awarded attorney fees. The Board said that since appellant had been affected by an adverse action, he was entitled to the procedural safeguards established under 5 U.S.C. §7513 and 5 C.F.R. §752 and that the agency's failure to comply with the procedures constituted harmful procedural error. The Board ordered the agency to cancel the removal (purported resignation) and left open the question of attorney fees.

DANIEL CLANCY v. DEPARTMENT OF THE NAVY
(Docket No. PH07528010343) May 15, 1981

Appellant was removed from his position for: (1) absence without leave; (2) unauthorized possession of government property; and (3) wasting time. The agency considered appellant's past disciplinary record in its determination to remove appellant. In the initial decision, the presiding official sustained the charges with the exception of the charge of wasting time, and determined that the two remaining charges, when considered together with appellant's past disciplinary record, warranted appellant's removal. Additionally, the presiding official addressed appellant's contention that the basis for the removal action was appellant's handicapping condition, and that the agency's action was based on a prohibited personnel practice. The presiding official determined that appellant failed to establish a *prima facie* case of handicap discrimination, finding that appellant never established that he was a qualified handicapped person under 29 C.F.R. 1613.702(a) and (f).

In his petition for review, appellant argued that: (1) the charges against him were insufficient to support removal; (2) the penalty of removal was applied to him in a disparate manner; and (3) that he had established his handicapping condition and discrimination based upon such condition.

The Board determined that the focal point of all of appellant's contentions was his alleged handicapping condition and said that the petition for review misconstrued the finding of the presiding official. The Board

noted that the presiding official determined that appellant had failed to establish a *prima facie* case of handicap discrimination because of his failure to establish that he was a *qualified* handicapped employee.

The Board found a great deal of controversy in the record as to whether appellant's supervisors knew, prior to the proposal to remove him, of his nervous condition. The Board agreed that appellant had failed to establish a *prima facie* case of handicap discrimination, and the penalty of removal was appropriate. The Board found that appellant's contention that no such penalty was imposed upon another similar situated employee without merit, since no basis for comparison was shown between appellant and the other individual. The petition for review was denied.

ROBERT DUMONT v. VETERANS ADMINISTRATION
(Docket No. BN07528010021) May 20, 1981

Appellant was removed for: (1) engaging in outside employment without authorization while on pay continuation and leave without pay in lieu of sick leave; and (2) attempting to defraud the government. In the initial decision, the presiding official reversed the agency's action. The agency petitioned for review of the decision, and the Board granted the petition.

In its petition for review the agency argued that: (1) the presiding official misinterpreted the agency's leave policy by finding that the reporting requirement for outside employment applied only to outside employment during an employee's normal working hours, rather than, for the entire time of each period of leave, from its beginning date to its ending date; and (2) the record supported the conclusion that the appellant misrepresented his physical status to obtain leave and thereby attempted to defraud the government.

The Board concluded that: (1) appellant did not have clear notice of his obligations and in the absence of clear notice, the appellant could not be held responsible for his failure to notify the agency of his outside employment; and (2) because of the absence of any evidence that the appellant did not actually suffer the alleged injuries or illness, and the ambiguity of the agency regulation which permitted outside employment in some circumstances, the record was insufficient to establish an intent to defraud the government. The Board found that the agency failed to meet its burden of proving by a preponderance of the evidence, that appellant attempted to defraud the government.

The initial decision was affirmed.

ARTHUR GILLIAM v. DEPARTMENT OF COMMERCE
(Docket No. NY075209029) May 5, 1981

Appellant's removal was based on tardiness and absence without leave. In the initial decision, the presiding official sustained the agency's charges, noting that there was nothing in the record to show that any agency official was or should have been aware that appellant had a possible nervous condition, and that appellant had not offered any information regarding his behavior to the agency.

In his petition for review, appellant argued that the presiding official erroneously interpreted an agency regulation requiring assistance to employees who have personal problems and contended that the agency was aware of his medical problems but did not give assistance or counseling in accordance with agency policy.

The Board found that appellant presented medical evidence to the agency that reasonably placed it on notice that a medical condition existed which made appellant a troubled employee. The Board found that by not following agency procedures contained in section 3 of the National Oceanic and Atmospheric Administration's Employee Assistance Program, the agency committed harmful error which likely affected the agency's removal action. The Board granted the petition for review, reversed the initial decision and ordered the agency to cancel the appellant's removal.

PEDRO HIJAR v. DEPARTMENT OF THE ARMY
(Docket No. DA07528010029) May 12, 1981

Appellant resigned from his position subsequent to his being charged with first degree murder. Appellant was incarcerated prior to the trial, and during that time, requested 154 hours of retroactive annual leave. Appellant further requested that he then be placed on 30 days leave without pay (LWOP). The agency approved appellant's annual leave request but approved only 78 hours of the LWOP request. Appellant was later notified that the agency would start carrying him in an absent without leave (AWOL) status if he failed to report for duty. During that period, appellant was advised through his relatives that he could be subject to disciplinary action if he was placed on AWOL.

The Board's presiding official found that although appellant involuntarily accepted the terms of the agency to either resign or be placed on AWOL status, and that the circumstances permitted no other alternatives, appellant did not make the required showing that the circumstances were the result of coercive acts on the part of the agency. Accordingly, the presiding official found that the resignation was voluntary and subsequently dismissed the appeal.

In his petition for review, appellant contended that he was faced with unacceptable alternatives as a result of the agency's coercive acts in wrongfully denying him LWOP and that the presiding official erroneously concluded that the resignation was based on his need for immediate funds.

The Board noted that although a resignation is usually considered to be a voluntary action, and not subject to the Board's jurisdiction, a coerced resignation is deemed to be tantamount to discharge. The Board further noted that the voluntary nature of a resignation is an issue of fact, and the validity of a resignation may be rebutted by evidence which establishes that the resignation was obtained through coercion, and was therefore involuntary. The Board said that in order to overcome the presumption that a resignation is valid, an appellant must meet a tripartite test that requires the appellant to show: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that the circumstances were the result of coercive acts of the opposite party. Because appellant failed to show that his resignation was coerced, the Board concluded that the appellant did not involuntarily accept the terms of the agency in resigning.

The Board further concluded that the appellant could have elected to have been placed in an AWOL status and then challenged any disciplinary action based thereon, and that there was no showing that the circumstances of the resignation resulted from coercive acts on the agency's part.

The Board therefore denied the petition for review.

DANIEL T. HOWARD v. DEPARTMENT OF THE ARMY
(Docket No. PH075209128) May 15, 1981

Appellant was removed for 1 hour of absence without leave. In the initial decision, the charge was sustained. The agency contended that appellant's removal, based on the sustained charge, when considered with appellant's past disciplinary record, promoted the efficiency of the service. However, when appellant contested the charges underlying the most recent of the prior disciplinary actions, the agency failed to submit any evidence supporting the underlying charges. The presiding official cited *Henckle v. Campbell*, 462 F. Supp. 1286 (D.Kan.1978), and ruled that when conditions set forth in *Henckle* are not met, an appellant could challenge the past record citation.

The agency's petition for review challenged the presiding official's ruling on the basis that it restated *Federal Personnel Manual* (FPM) Supplement 752-1 S4-3(b)(1), and that FPM Supplement 752 was revoked.

The Board noted that the revised FPM Chapter 752 3-3e(3) cited the *Henckle* decision. The Board followed the *Henckle* decision and held that where the employee has not had a prior opportunity to dispute the charges and where the agency puts on no proof with respect to the prior disciplinary action, that action may not properly be considered in reviewing a penalty. Accordingly, the petition for review was denied.

PAUL A. JACOBSON v. DEPARTMENT OF THE ARMY
(Docket No. AT075209133) May 7, 1981

Appellant was removed for failure to perform satisfactorily. Appellant argued that his discharge was arbitrary, capricious, and motivated by malice and religious animus. He also alleged that he was denied his right to a hearing and never advised of any right to appeal the action. The agency contended that appellant had no right of appeal because he was serving a probationary appointment under an initial appointment. The presiding official determined that he had completed his probationary period, and that he was entitled to appeal the removal. The agency action was reversed.

In an addendum decision, the presiding official denied appellant's request for attorney fees, finding that such an award was not warranted in the interest of justice. Appellant petitioned for review of this addendum decision, contending that the issue of whether attorney fees were warranted could not be resolved until there were findings on appellant's claims of religious discrimination and agency bad faith in removing him.

The Board granted the petition for review and remanded the case to the field office for further proceedings. The Board found that appellant should have been afforded an opportunity to present evidence on his allegations of religious discrimination and bad faith.

S. DOYLE LITTLEDYKE v. DEPARTMENT OF AGRICULTURE (Docket No. SF075209209) May 28, 1981

Appellant was removed from his position, and in the initial decision, the presiding official reversed the action, finding that the decision to remove was based on charges additional to the ones of which appellant had been given advance notice, and that the decision thereby violated appellant's rights under 5 U.S.C. 7513(b), and that the violation constituted harmful error.

The agency petitioned for review, and the Board granted the petition. The Board disagreed with the presiding official's determination that the circumstances of the case constituted harmful error as de-

fined at 5 C.F.R. 1201.56(c)(3). The Board noted that the advance notice showed that appellant's removal was proposed for 12 specified failures in performance over a 30-day period, and that these alleged performance deficiencies occurred after a 10-month period of alleged inadequate performance of a similar nature and in spite of efforts to assist appellant. The Board noted that appellant was not foreclosed from addressing any issue of his past performance, and appellant did discuss his work history and previous performance in his replies.

The Board found no error by the agency, and it found that appellant had failed to meet his burden of proof of harm. The Board reversed the initial decision and remanded the case to the field office for further adjudication. The Board said that while the presiding official noted that the evidence presented by appellant put into question whether the seriousness of the enumerated assignments would justify the penalty of removal, he did not reach the merits of the agency's charges.

JAMES W. PRESCOTT v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Docket No. DC07528010027) May 18, 1981

Appellant was removed upon charges that he used his official position and resources to pursue his private interests, and he misused government-paid mailing materials. Appellant admitted to the conduct but claimed that: (1) his actions were protected by the first amendment of the U.S. Constitution; (2) that his actions were protected by the whistleblower's provisions at 5 U.S.C. 2302(b)(9). The presiding official rejected appellant's affirmative defenses, and affirmed his removal.

The Board granted appellant's petition for review and determined that: (1) upon the presiding official's application of *Pickering v. Board of Education*, 291 U.S. 563 (1968) and upon the Board's additional application of *Foster v. Ripley*, No. 79-2107 (D.C. Cir. April 7, 1981), appellant failed to establish the existence of any first amendment protection for his conduct; and (2) the policy dispute between appellant and appellant's supervisor was not the sort of information which one could reasonably believe to evidence a violation of law, mismanagement, or other matter, as contemplated by 5 U.S.C. 2302(b)(8). The Board concluded that the action for which appellant was removed did not constitute a protected activity under the first amendment or 5 U.S.C. 2302(b)(8) or (b)(9) and, therefore, he failed to prove his affirmative defense of reprisal.

The initial decision was affirmed as modified.

EDMUND A. REITHMAIER v. DEPARTMENT OF THE AIR FORCE (Docket No. DA075299021) May 5, 1981

Appellant was removed for wrongful appropriation of government property. In the initial decision, the presiding official affirmed the removal.

In his petition for review, appellant alleged that the presiding official erred in finding that the agency had supported its charges by a preponderance of the evidence as required by 5 U.S.C. §7701(c)(1)(B).

The Board granted the petition for review and found that the agency engaged in highly improper procedures and that the presiding official erred in concluding that the agency's hearsay evidence was of sufficient probative value, when weighed against appellant's contradictory live testimony at the hearing, to meet the preponderance of the evidence standard. The Board noted that the agency failed to appear or present any admissible evidence at the hearing before the presiding official, and therefore failed to carry its burden of proof by a preponderance of the evidence. The agency's action was reversed.

The Board admonished the Department of Air Force for its conduct in this appeal, noting that the agency should have known that the Board could not condone the agency's attempt to deny appellant his statutory right to a hearing in which appellant could confront and crossexamine his accusers. The Board said that appellant could file a motion for award of attorney fees within ten days of his receipt of this decision.

PHILLIP T. RIGGIN v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION (Docket No. PH07528010273) May 4, 1981

Appellant was removed for alleged falsification of his Personnel Qualifications Statement, SF-171, and his Declaration of Appointee, and for his arrest and conviction for disorderly conduct. In the initial decision, the presiding official found: (1) that the two charges of falsification were based on documents that were improperly retained by the agency, and that consequently these charges did not state a cause of action; and (2) that while the third charge was sustained by a preponderance of the evidence, appellant's removal for this charge did not promote the efficiency of the service. Accordingly, the agency was ordered to cancel the action and purge its files of any direct or indirect reference to the action.

In the petition for review, the agency disputed the presiding official's finding that it had improperly retained the two documents and disputed the conclusion that the removal did not promote the efficiency of the service.

The Board found that statements made by the presiding official in the initial decision were inconsistent with the provisions of 5 C.F.R. 1201.111(b)(1), which requires that each initial decision contain findings of fact and conclusions upon all material issues of fact and law present on the record. The Board also found that the burden of establishing an affirmative defense was on the employee, and in order for appellant to have satisfied the provisions of 5 U.S.C. 7701(c)(2), he was required to show more than simply that the completion of the forms in questions was not mandated by applicable civil service regulations or instructions. Finally, the Board found that the presiding official erred in concluding that the agency acted improperly in retaining the two documents at issue. The Board said that the fact that the agency was ultimately ordered to vacate a prior removal action cannot be properly construed as creating a bar to a subsequent adverse action based on alleged misconduct during the pendency of the agency request for reopening.

The Board found that the appellant did not sustain his burden of showing an affirmative defense as set forth in 5 U.S.C. 7701(c)(2). The Board granted the petition for review, vacated the initial decision, and remanded the case to the field office for a new decision.

ROBERT P. SMITH v. DEPARTMENT OF THE INTERIOR (Docket No. DA075209173) May 6, 1981

Appellant was removed for maintaining a continuing outside relationship that constituted a conflict of interest. In the initial decision, the presiding official upheld the removal.

In his petition for review, appellant argued that: (1) the presiding official's underlying factual findings that he actually maintained an interest in an outside employment, or advocated awarding any contract to it were insufficient; (2) regardless of any conflict of interest, the punishment of removal was excessive; (3) the agency improperly ordered him to divest himself of the property creating the conflict of interest; (4) he was not given the order by the designated official; and (5) procedural error was committed in that the agency did not provide him with all the material relied upon in proposing the adverse action.

These were the Board's conclusions:

(1) Because appellant did not demonstrate with any specificity any factual errors made by the presiding official in reaching his conclusion, the Board deferred to the factual determination of the presiding official.

(2) The Board cited *Curtis Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10,

1981) for authority to mitigate penalties. In view of the serious nature of appellant's wrongdoing, the Board concluded that the agency's penalty was not so excessive as to be unreasonable, arbitrary, or capricious.

(3) The Board decided that the agency had met its regulatory requirements that an employee must be given an opportunity to resolve his conflict of interest before disciplinary action is taken, and that there was no harmful error in regard to the officer who issued the divestiture offer.

(4) The presiding official found that the agency did commit error by failing to provide appellant all the material relied upon in proposing his removal. However, the Board agreed with the presiding official's findings that appellant failed to show that the agency's error harmed him, or that the presiding official misinterpreted 5 C.F.R. §1201.56.

The petition for review was denied.

JOSEPH T. SNIPES v. UNITED STATES POSTAL SERVICE (Docket No. AT075209206) May 1, 1981

Appellant was removed for sexual harassment of employees he supervised. In the initial decision, the presiding official sustained four of the five specifications brought against appellant, and affirmed his removal. Appellant petitioned for review, challenging the presiding official's interpretation of the evidence and reasserting his claim that the penalty of removal was too harsh.

The Board said that appellant's petition failed to demonstrate that the presiding official's findings of fact were erroneous, and the Board's consideration of all factors relevant to appellant's penalty did not reveal that the presiding official erred in affirming the penalty of removal. The Board noted that it will modify an agency-imposed penalty only when it finds that the agency's judgment clearly exceeds the limits of reasonableness. *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1980). In view of the nature and seriousness of appellant's offense, particularly in relation to his position as a supervisor, the Board found that the penalty of removal was reasonable and denied the petition for review.

BEATRICE R. SPIEGEL v. DEPARTMENT OF THE ARMY (Docket No. NY075209005) May 4, 1981

Appellant resigned from her position and then appealed to the Board, alleging that she resigned due to unbearable harassment. The presiding official issued an initial decision without a hearing, holding that ap-

pellant's resignation was voluntary. The Board remanded the case to the field office after finding that the initial decision was in error, in that appellant had raised a "non-frivolous allegation of involuntariness" that entitled her to a hearing. *Spiegel v. Department of the Army*, 2 MSPB 307.

The presiding official, after holding a hearing, held that based on a preponderance of the evidence, appellant's resignation was voluntary and, therefore, the Board lacked jurisdiction to consider the appeal under 5 U.S.C. 7512.

Appellant's petition for review challenged the presiding official's application of the preponderance of the evidence standard. She argued that the presiding official adopted a more stringent preponderance of the evidence standard than the standard stated by the Board in *Vandiver v. General Accounting Office*, MSPB Docket No. DC075299062 (September 5, 1980). Appellant also said that the presiding official erred in her evaluation of the evidence regarding the voluntariness of the resignation.

The Board found that the presiding official correctly interpreted *Vandiver* as an adoption of the preponderance of the evidence standard in such cases. The Board's regulations at 5 C.F.R. 1201.56(a)(2) provide that the appellant has the burden of proof as to issues of jurisdiction. The Board said that although the regulations do not state what degree of proof is applicable in establishing jurisdiction, it had held in *In re Frazier, et al.*, 1 MSPB 159, that the preponderance of the evidence standard is the one most commonly invoked in proceedings and the one generally best suited to the type of cases adjudicated by the Board. The Board also determined that the presiding official had properly evaluated the evidence submitted by the parties on the voluntariness of the resignation.

The Board found that the petition did not meet the criteria for review and denied it.

Jurisdiction

ROBERT E. FINLEY v. DEPARTMENT OF THE NAVY (Docket No. DC075299019) May 21, 1981

Appellant was evacuated from Iran in February 1979 and was downgraded to the GS-13 position he held prior to his assignment in Iran. He appealed the action, but in the initial decision, the presiding official dismissed the appeal on the basis that a downgrading action resulting from a restoration action was not one that was appealable to the Board.

Appellant then filed a petition for review of the initial decision, alleging that his position in Iran had

been abolished and that reduction in force procedures should have been used. The Board noted that the documentary evidence submitted did not indicate that his position was abolished. Subsequent to the filing of the petition and responses to the petition, the agency informed the Board that it had granted grade retention rights to the appellant based on approval of its request to the Office of Personnel Management for authority to extend grade retention to all Department of Defense employees who were evacuated from Iran regardless of their individual return rights. This authority was granted under 5 C.F.R. 536.213, pursuant to 5 U.S.C. 5365(b)(2)-(3).

The Board noted that the question of appellant's right to grade and pay retention was resolved, and it dismissed the appeal as moot.

MOOTNESS

VERNON H. HARDY, ROBERT E. PHILLIPS, ANTHONY L. RUFO v. DEPARTMENT OF THE NAVY (Docket No. PH075209006) May 22, 1981

Appellants in this case were employees who were assigned to overseas rotational positions. Mr. Phillips and Mr. Rufo received promotions concurrently with their overseas assignments, and Mr. Hardy was promoted during his overseas tour. Each was reduced to the grade of the position held prior to his overseas assignment upon return to the United States. In the initial decisions of Messrs. Hardy and Phillips, the presiding official found that the reductions in grade were adverse actions and reversed the agency actions since appellants were not afforded procedural rights granted in 5 U.S.C. 7513 and 5 C.F.R. 752. In Mr. Rufo's initial decision, the presiding official treated the appeal as one arising under 5 U.S.C. 5337 and then 5366(b)(1) and concluded that the Board had no jurisdiction to hear the matter and dismissed the appeal.

None of the appellants filed a petition for review of the initial decisions. The Board reopened these cases and directed the agency to file a brief addressing the issues of: (1) whether 5 U.S.C. 5366(b)(1) applies in the case of a reduction in grade which occurs at the completion of a rotational assignment; (2) whether 5 C.F.R. 335.102 applies in such cases; and (3) whether such reduction in grade is an adverse action.

The Board was notified by the agency that it had extended grade retention to the appellants pursuant to a ruling by the Office of Personnel Management granting grade retention rights to agency employees evacuated from Iran in 1979. Since the question of appellant's rights to grade and pay retention had been

resolved in the appellants' favor while the appeals were pending, the Board dismissed the appeals as moot.

PARTICULAR EMPLOYMENT CATEGORIES

BENNIE BATES v. DEPARTMENT OF THE NAVY (Docket No. SF315H99010) May 22, 1981

Appellant was removed during his probationary period based on inadequate performance of his duties. In his petition for appeal, appellant alleged that the basis for removal was false and that the removal was actually based on discrimination because of religion, political partisanship, and physical handicap. The presiding official affirmed appellant's removal.

The appellant petitioned for review, but the proffered evidence was not new or material and failed to meet the criteria for granting a petition for review. The Board granted the petition for review, however, to clarify jurisdictional issues pertaining to probationary employees raised in this case.

The Board noted that a probationary employee terminated for post-appointment reasons may appeal to the Board solely on the basis of an allegation that the action was taken in whole or in part as a result of discrimination because of marital or partisan political reasons. However, the presiding official limited his consideration of appellant's appeal to the allegation of partisan political discrimination and found that he lacked jurisdiction to decide any other of appellant's claims of prohibited discrimination. The Board further noted that an appellant has a statutory right to have claims of religion, physical handicap, or other prohibited discrimination adjudicated by the Board in conjunction with a bona fide claim of partisan political or marital status discrimination cognizable under 5 C.F.R. 315. However, a bare allegation of marital status or partisan political discrimination will not serve to confer jurisdiction on the Board to hear other prohibited discrimination claims.

The Board noted that appellant submitted neither evidence nor argument to support his otherwise totally unspecific allegation of partisan political discrimination, and his claim made therein was clearly frivolous and totally without merit. The Board said that the presiding official's decision to exclude appellant's other claims of prohibited discrimination should not be overturned since his analysis of the Board's jurisdiction constitutes, at most, harmless error.

The Board affirmed the initial decision that sustained appellant's removal as modified by this opinion.

**DONALD CLAXTON v. DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS** (Docket No. SL03538010094)
May 5, 1981

Appellant appealed to the Board's St. Louis Field Office, contending that the agency failed to restore him to his position following a compensable injury, as required by 5 U.S.C. 8151. The agency contended that appellant had no right to restoration since he declined to return to duty in a limited capacity and, instead, resigned for personal reasons.

In the initial decision, the presiding official found that although appellant had contended that his resignation was involuntary, he had not provided any evidence tending to prove this. The presiding official dismissed the appeal as not within the Board's appellate jurisdiction.

In the petition for review, appellant contended that the presiding official erred in denying him a hearing in connection with his appeal. The Board has consistently held that where an employee's right of appeal is, as here, dependent on an alleged involuntary action, the presiding official must carefully examine the employee's allegation, and if it is found to be non-frivolous, grant the employee a hearing on that issue.

The Board said that the issue before the presiding official was not whether appellant had met his burden of showing that his resignation was involuntary, but rather, whether appellant had raised a non-frivolous allegation of involuntariness. The Board found that the presiding official erred in deciding the appeal without affording appellant a hearing on the issue of voluntariness. Accordingly, the petition for review was granted, the initial decision was reversed, and the case was remanded to the field office.

PRACTICE AND PROCEDURES

MICHAEL A. FOLEY v. DEPARTMENT OF INTERIOR
(Docket No. DA03518010260) May 4, 1981

Appellant's appeal of his agency's notice of reduction in force (RIF) was prematurely filed and dismissed without prejudice in the initial decision. Appellant did not submit a petition for review of that decision nor did he refile his appeal to the field office within the applicable period.

Appellant resubmitted his appeal to the field office 82 days after the effective date of the RIF action. Appellant indicated that he had signed a power of attorney, and he assumed that his attorney would handle

the appeal of his case. The Board noted that no evidence of the date, purpose, or even the existence of this power of attorney appeared in the record.

The presiding official determined that good cause had not been shown to waive the 20-day period for the timely filing of his appeal, and dismissed the appeal. In his petition for review of the second initial decision, appellant protested the dismissal of his appeal on the issued of timeliness rather than on the merits. The Board denied the petition for review noting that the length of appellant's delay in light of repeated notifications of the time limit, the lack of extenuating circumstances preventing his compliance with the time limit, and his own inexcusable neglect in the processing of his appeal indicated that good cause was not shown to waive the 20-day filing period. Accordingly, the petition for review was denied.

SANDY PORTER v. DEPARTMENT OF THE NAVY
(Docket No. SF075299089) May 20, 1981

Appellant was removed for theft of government property. In the initial decision, the presiding official reversed the removal, and the agency petitioned for review. In its petition, the agency did not directly challenge the initial decision, but called into question the presiding official's failure to act on his own initiative to enforce a subpoena compelling the attendance of a witness at the hearing. Because enforcement of subpoenas issued under the authority of 5 U.S.C. 1205(b)(2) was a matter not previously addressed by the Board, the petition was granted.

The Board discussed the issue of subpoenas at length, noting that because subpoenas are issued for the benefit of the requesting party, when a subpoena is not honored, the requesting party must indicate in a motion for enforcement that it considers the witness's testimony to be of sufficient importance to the case to warrant invoking the authority of a United States district court. It is incumbent on the party to inform the Board that it considers the testimony necessary to its case.

In this case, the Board noted, no motion for enforcement was submitted either orally during the hearing or in writing prior to the issuance of the initial decision. The Board also noted that the agency representative made no attempt to insure that the record would remain open after the hearing for receipt of the witness's testimony. The Board said that in light of the actions by the agency representative, it was reasonable for the presiding official to conclude that the agency no longer believed it was necessary to obtain the testimony of the absent witness.

The Board noted that the petition for review was merely an offer by the agency to provide additional evidence to support its decision when it was informed that it had failed to prove an essential element of its case. The Board further noted that the offer came too late, since the Board found that the agency did not exercise due diligence to make the testimony of the absent witness available prior to the close of the record. The Board affirmed the initial decision.

REDUCTIONS IN FORCE

WALLACE R. HARRIS v. DEPARTMENT OF THE TREASURY (Docket No. DC03518010344) May 1, 1981

Appellant's position was abolished as a result of a reduction in force, and appellant was offered and accepted a lower grade position. In his petition for review, appellant argued that he was entitled to bump into another position.

The Board found that appellant's petition did not meet the criteria for review set forth at 5 C.F.R. 1201.115. The Board has previously held that when an agency's reduction in force action is challenged by an affected employee, the agency must show by a preponderance of the evidence that the regulations contained in 5 C.F.R. Part 351 were properly applied to the employee. *Shockro v. Federal Communications Commission*, 2 MSPB 361. *Losure v. Interstate Commerce Commission*, 2 MSPB 361. The Board found that the presiding official did not determine whether the agency proved by a preponderance of the evidence that it had followed the RIF regulations that effected appellant's assignment, and the appeal was reopened, pursuant to 5 C.F.R. 1201.117 to enable the Board to make such findings.

The Board found that the agency had shown by a preponderance of the evidence, that appellant was not qualified for the position under 5 C.F.R. 351.701. Appellant was offered the position requiring the least possible reduction in representative rate as required by 5 C.F.R. 351.704. The Board affirmed the initial decision as modified.

RUTH ANN PATRICK v. DEPARTMENT OF TRANSPORTATION (Docket No. DC03518010252) May 18, 1981

Appellant was changed to a lower grade through reduction in force (RIF) procedures. In the initial

decision, the presiding official affirmed the agency's action.

In the petition for review, appellant contended that the presiding official erred: (1) in not ruling on the allegation of agency noncompliance with recommendations set forth in a prior report to the Special Counsel, Merit Systems Protection Board; and (2) in failing to treat the Special Counsel's recommendations as conditions or limitations upon the agency's discretion to conduct the RIF. The initial decision held that compliance with recommendations of the Office of the Special Counsel could only be addressed by the Board upon the filing of a request by the Special Counsel under 5 U.S.C. 1206(c)(1)(B). Appellant argued that since the Board has the appellate jurisdiction to hear her RIF appeal, it was a waste of administrative resources to sever the issue of compliance for consideration in another forum, and analogized the matter to principles of pendent jurisdiction in the Federal courts.

The Board found no merit to appellant's contentions. It said that under 5 U.S.C. 1206(c)(1)(B), only the Special Counsel is authorized to request the Board to consider an agency's alleged noncompliance, and the determination as to whether to file such a request is discretionary with the Special Counsel. Accordingly, appellant did not have the right to request the Board to review the agency's alleged noncompliance, nor did appellant have the right to compel the Special Counsel to seek Board enforcement.

The Board found no merit to appellant's second contention, noting that the presiding official afforded appellant a full opportunity to show the relevance of the Special Counsel report and recommendations in relation to her various allegations, and considered her arguments in arriving at his findings and conclusions. The Board said that appellant presented no statutory or regulatory basis to support her contention that the recommendations of the Special Counsel should have been treated as limitations on the agency's discretion to conduct the RIF. The Board found that appellant failed to make a showing consistent with the provisions of 5 C.F.R. 1201.115, and in the absence of a showing that there were serious evidentiary questions, the Board would not undertake a complete review of the disputed findings of the presiding official. Accordingly, the petition for review was denied.

RETIREMENT

FRANCISCO E. CHAVEZ v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DA831L09003)

May 28, 1981

Appellant applied to the Office of Personnel Management (OPM) for disability retirement, and OPM disallowed his claim for disability. Appellant submitted further medical evidence and requested OPM to reconsider its determination. OPM reconsidered his claim and adhered to its original decision. Appellant appealed to the Board's Dallas Field Office, pursuant to 5 U.S.C. 8347(d) and 5 C.F.R. 1201.3(a)(6). The presiding official found that the objective medical evidence did not demonstrate that appellant's condition was totally disabling and he concluded that appellant was not totally disabled for useful and efficient service in his position. He then sustained OPM's reconsideration decision.

The Board reopened the appeal pursuant to 5 U.S.C. 7701(e)(1)(B), to address the issues of: (1) the Board's scope of review in such cases; (2) who must bear the burden of proof in a voluntary disability retirement appeal under 5 U.S.C. 8347(d); (3) the standard of proof in such appeals and the application of such standards to the evidence in this case.

These were the Board's conclusions: (1) OPM contended that the "finality clause" of 5 U.S.C. 8347(c) limits the Board's scope of review to that employed by the appellate courts, and precludes the Board from considering evidence which had not previously been presented to OPM. The Board reaffirmed, as held in *Hein v. OPM*, 1 MSPB 396, that disability retirement appeals are governed by 5 U.S.C. 7701, rather than 5 U.S.C. 8347. The Board stated that it is mandated by 5 U.S.C. 7701(a) and (b) to conduct a hearing if requested by the appellant, and to consider *de novo* all the relevant evidence presented by both parties, whether offered at a hearing or transmitted as part of the administrative record. The Board therefore found no merit to OPM's contention that the presiding official erred in admitting and considering additional medical evidence during the adjudication of the appeal.

(2) In view of the clear Congressional intent to effect only technical and conforming changes in Section 8347 under which the burden of persuasion has long been allocated to voluntary retirement applicants in accordance with generally accepted principles of law, the Board concluded that Section 7701(c) does not alter the assignment to applicants of the ultimate burden of persuasion in such cases. This conclusion was consistent with the manifest intention of Con-

gress in enacting Section 7701(c) to place the burden of proof on the party initiating the action. In sum, the Board held that it is the employee who bears the burden of persuasion by a preponderance of the evidence in an appeal before the Board from an OPM decision on a voluntarily-initiated employee application for disability.

(3) The Board noted that the ultimate determination must be based upon the probative value of all the evidence taking into account each of the elements of proof—objective clinical findings, diagnoses and expert medical opinions, subjective evidence of pain and disability, together with all evidence relating to the effect of the applicant's condition upon his or her ability to perform in the grade or class of position last occupied. The Board determined that 5 U.S.C. 8331(6) imposes no requirement that a disability determination must be based on any single one of these elements of proof. The Board concluded that the presiding official erred in assuming that appellant's claim for disability retirement benefits could not be granted if it was not proven by objective medical evidence.

The case was reversed and remanded to the presiding official for readjudication.

DAVIE M. DILL v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. SL831L09008) May 22, 1981

This case came before the Board on appellant's petition to review the initial decision that affirmed the Office of Personnel Management's (OPM) denial of appellant's application for disability retirement under 5 U.S.C. 8337.

In appellant's petition for review, she argued that the initial decision should be reversed because no evidence of any kind was offered by the respondent relative to appellant's cardiological, vascular, neurological, and related conditions. In response to the petition for review, OPM filed an untimely response, stating that the petition did not meet the criteria for review.

The Board found that the presiding official erred in finding appellant not to be disabled within the meaning of 5 U.S.C. 8337 and 8331(6). The Board said that inasmuch as OPM submitted no evidence contrary to that offered by appellant concerning the diagnosis of hypertension and its additive effect on her arthritic condition and since the evidence overwhelmingly supported a finding of disability, OPM's decision could not be sustained. The Board granted the petition for review, reversed the initial decision, and ordered OPM to cancel its action denying appellant's application and to process the application as approved.

REMEDIES

SHERWIN L. CIRCLE v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DA831L209012) May 5, 1981

The initial decision in this case reversed the Office of Personnel Management's (OPM) denial of appellant's application for disability retirement. OPM did not petition for review, and the decision became final. By that decision OPM was directed to furnish evidence of compliance to the Field Office within five days of the date the decision became final. OPM failed to furnish the required documentation. Appellant's counsel petitioned for enforcement of the decision.

OPM furnished evidence of compliance during the proceedings pursuant to the Notice to Show Cause. The Board found that sanctions provided by 5 U.S.C. §1205(a)(2) and (d)(2) should not be imposed against the responsible official. The Board noted that the confusion which led to the petition for enforcement was due to the fact that appellant did not inform his attorney that he was receiving the funds in question, as well as to an administrative error by OPM. The Board stated that OPM failed to comply with its order to furnish evidence of compliance and that, in light of OPM's new procedures, evidence of compliance henceforth should be promptly furnished in future cases.

No further action was required by the Board.

PATRICIA ERDMAN v. DEPARTMENT OF LABOR (Docket No. DC07528010012) May 5, 1981

Appellant was suspended for allegedly failing to report for a detail as ordered. In the initial decision, the presiding official reversed the agency action, finding that appellant had reported for the detail, and that the agency had not supported its case by a preponderance of the evidence. Appellant timely filed for attorney fees and costs.

In an addendum decision (dated November 10, 1980), the presiding official concluded that attorney fees were warranted in the interest of justice, finding that the agency should have known that it would not prevail on the merits because appellant was substantially innocent of the charges.

In the petition for review of the addendum decision, the agency argued that the adverse action against appellant had merit and that the presiding official failed to consider the general circumstances surrounding the case. The agency further contended that case law

required a showing that the agency acted in bad faith and with ill will in order for an award of fees to be appropriate. The agency further argued that the amount of fees requested was excessive.

The Board agreed with the presiding official's award of attorney fees, noting that there does not have to be a finding of bad faith and ill will in order to grant fees. The Board also agreed with the finding that the proposing official clearly ignored clear evidence that showed appellant substantially innocent of the charges. Finally, the Board found that an award of \$80 per hour was a reasonable fee in this case, and that the presiding official's award of \$7,568 was warranted in the interest of justice. In addition, the Board found that the fee award should be increased by \$560 to \$8,128 to include seven hours of time expended by appellant's attorney to review the petition and prepare the response.

Accordingly, the Board denied the agency's petition for review of the addendum decision and modified the decision to award attorney fees in the total amount of \$8,128.

DONALD E. LONG v. DEPARTMENT OF THE ARMY (Docket No. DE075299008) May 1, 1981

This appeal was before the Board upon petition for review by both the appellant and the agency. The appellant had taken exception to the dismissal of his motion for compliance by the Field Office. The agency had objected to the dismissal of the motion for attorney fees as the ratification of an agreement by the agency to pay the appellant's attorney fees, which it claims never existed.

In the initial decision, the presiding official found that the agency's refusal to permit the appellant to rescind his voluntary resignation prior to its effective date rendered it involuntary, because the agency (unintentionally) misrepresented to the appellant that he had to sign a resignation form in order to be granted leave without pay.

In response to the appellant's subsequent motion for an award of attorney fees, the presiding official found that it was not necessary to make a ruling because the parties were in agreement as to the payment, the agency having acknowledged the amount. The agency asserted in its petition, however, that no agreement had been reached.

The Board found that the dismissal of the motion for attorney fees was improper. If the presiding official was under the impression that the parties had agreed

about the agency's payment of the appellant's attorney fees, he should have requested their written stipulation to that effect, which would have rendered the motion moot. Absent such a stipulation, the presiding official was obliged to rule on all material issues of fact and law raised by the motion, 5 C.F.R. 1201.111, in an addendum decision comporting with the statutory and regulatory requirements for an award of attorney fees, 5 U.S.C. 7701(g)(1) and 5 C.F.R. 1201.37(a).

After the initial decision had become final, the appellant filed a motion for compliance with the presiding official's order that the resignation be cancelled, in accordance with 5 U.S.C. 1205(a)(2) and 5 U.F.R. 1201.112. The acting chief appeals officer denied the motion for compliance, finding that the resignation was cancelled as ordered.

The Board concurred with the chief appeals officer's determination that the agency was in full compliance with its final decision. Appellant's basic contention concerning the agency's compliance with the Board's decision related to the agency's action of reviving a leave without pay request for a 90-day period in 1979. The Board noted that appellant had not shown in any way that he was ready, willing, and able to work during the period of time in question. The Board concluded that to order the agency to reinstate appellant retroactively without consideration of the leave without pay request would serve no purpose other than to provide appellant with a potential windfall recovery of back pay.

The Board denied review of the motion for compliance; granted review of the dismissal of the motion for attorney fees; vacated the addendum decision dismissing the motion for attorney fees; and remanded the appeal to the field office for issuance of a reconsidered addendum decision on the motion for an award of attorney fees.

SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

ODIS HOLT v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DA073109001) May 5, 1981

Pursuant to 5 U.S.C. 1205(a)(1), 5 C.F.R. 1201.116 and 1201.117, the Board reopened this case, vacated its opinion and order dated April 28, 1981, and affirmed as modified the initial decision of February 29, 1980.

The Office of Personnel Management (OPM) directed the Department of the Navy to remove appellant because OPM determined that he did not meet the suitability requirements for employment. OPM based the adverse suitability rating on criminal conduct, an intentional false statement about that conduct

in an employment application, and the habitual and excessive use of intoxicants. Appellant contested OPM's action alleging discrimination based on alcoholism. The Board noted that although reliance or prior alcohol abuse is clearly prohibited under 42 U.S.C. 4561, the presiding official's conclusion as to this defense was dictum since he did not sustain the charges of alcohol-related convictions or abuse of alcohol. The Board said that the presiding official found that appellant's removal would promote the efficiency of the service because appellant intentionally falsified his employment application.

Other May Issuances:

THE FOLLOWING PETITIONS FOR REVIEW WERE DENIED:

ACHACOSO, Cesario v. Office of Personnel Management (Docket No. SF083109011)
AMOG, Tarquiano A. v. Office of Personnel Management (Docket No. SF08318110131)
ARNOLD, Richard E. v. Tennessee Valley Authority (Docket No. AT07528010312)
BATCHELDER, Ralph M. v. Department of the Treasury (Docket No. BN07528010070)
BECKER, Mae Belle v. Government of the District of Columbia (Docket No. DC03518110071)
BEN, Sandra M. v. Department of Housing and Urban Development (Docket No. DC07528010201)
BEST, William E. v. Department of Defense (Docket No. SE075299018)
BLAIR, Gene G. v. Department of the Navy (Docket No. AT07528010020)
BOOK, Robert W. v. United States Postal Service (Docket No. SL07528010067)
BRIDGES, Billie J. v. Department of Health and Human Services (Docket No. SF07528010246)
BRIER, Kenneth A. v. Federal Aviation Administration (Docket No. BN07528010041)
BURBANK, Deborah A. v. Department of Transportation (Docket No. DC07528010398)
BYRNES, Edward M. v. Department of Health and Human Services (Docket No. DC07528010012)
CAHILL, Jerry L. v. U.S. Department of Agriculture (Docket No. DE07528110034)
CALLAHAN, Franklin v. Office of Personnel Management (Docket No. SF831L8010519)
CAMPBELL, Ann B. v. Department of the Treasury, Internal Revenue Service (Docket No. AT07528010213)
CANTOR, Stanley L. v. Office of Personnel Management (Docket No. PH831L8010313)
CARLISLE, Linda J. v. Department of the Air Force (Docket No. AT07528110026)

CARLO, Russell A. v. Veterans Administration (Docket No. NY07528010092)

CARROLL, Marva v. Equal Employment Opportunity Commission (Docket No. DC07528110239)

CHAPPELL, Earl v. Veterans Administration (Docket No. CH07528010114)

CHIAFARI, Mario B. v. Department of Interior (Docket No. DC07528010149)

CHIODO, Ralph v. Department of the Treasury (Docket No. SL531D8010066)

CLARK, Lorenzo E. (Docket No. NY07528010038) and William Curchin (Docket No. NY07528010039) v. Department of the Navy

COATES, Dorothy v. Department of the Air Force (Docket No. DC07528010120)

COLEMAN, Tommie E. v. District of Columbia Government (Docket No. DC03518110086)

COPELAND, Barbara N. v. Community Services Administration (Docket No. DC07528010191)

COX, Peggy J. v. U.S. International Trade Commission (Docket No. DE3538010204)

CRADDOCK, Janice L. v. Department of Health and Human Services (Docket No. BN07528010004)

CUMMINGS, James E. v. Department of Defense (Docket No. DC03518010183)

CURCHIN, William (SEE Clark)

DAVIS, Roosevelt v. United States Postal Service (Docket No. CH07528110020)

DE GUZMAN, Felix v. Office of Personnel Management (Docket No. SF08318110129)

DERMODY, Lawrence C. v. Office of Personnel Management (Docket No. BN831L8010057)

DEROUEN, Dorothy v. Office of Personnel Management (Docket No. DC831L8110025)

DRAPER, Rosalind A. v. Department of Housing and Urban Development (Docket No. SL03518110086)

DUNBAR, David M. v. Department of the Treasury (Docket No. AT07528010090)

EGBERT, Clark R. v. Office of Personnel Management (Docket No. SF831L8010295)

EPSTEIN, Louis v. Department of Health and Human Services (Docket No. PH07528010406)

EVANS, Ruthie D. v. Department of the Army (Docket No. DA07528010283)

FIKES, Jack M. v. Department of Justice (Docket No. BN075209025)

FIKSTAD, Lorin M. v. Department of the Army (Docket No. SF043209007)

FORRESTER, Evelyn L. v. Office of Personnel Management (Docket No. SF831L8010296)

FOX, Timothy M. v. Department of the Navy (Docket No. SF07528010401)

GARBISO, Richard H. v. Department of the Army (Docket No. DE075209002)

GILLESPIE, Mary Susan v. Department of Defense Dependents Schools (Docket No. DC075209250)

GOGNIAT, James W. v. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms (Docket No. DC07528010190)

GRAFFREAD, Clarence v. U.S. Postal Service (Docket No. AT07528110045)

GRAVES, Emma Pearl v. Department of Commerce (Docket No. DC07528110190)

GREEN, Georgia Mae v. Government of the District of Columbia (Docket No. DC03518010154)

GREEN, John v. U.S. Postal Service (Docket No. CH075209081)

GUY, Sara v. Department of Energy (Docket No. DE315H8010095)

HIBBARD, Jack v. Department of Interior (Docket No. AT315H09043)

HIGHTOWER, Renona M. v. Department of the Army (Docket No. AT07528010329)

HUDSON, LaGrant v. United States Postal Service (Docket No. AT07528010254)

HURT, Vera v. Department of Health and Human Services (Docket No. CH531D8010140)

HUSTON, James R. v. Department of the Air Force (Docket No. DA07528010297)

JEFFERSON, Russell C. v. Veterans Administration (Docket No. PH075209012)

JENSEN, Nancy v. Department of Transportation (Docket No. DA315H8010241)

JEWELL, Maros J. v. Department of the Army (Docket No. SE07528010052)

JOHNSON, Barbara v. Social Security Administration (Docket No. PH07528010337)

JOHNSON, Louis, Jr. v. Department of the Navy (Docket No. AT07528010162)

JOHNSON, Milford G. v. U.S. Postal Service (Docket No. CH03538010111)

KANGETER, Benny v. Department of the Army (Docket No. AT34438010269)

KARAPINKA, George L. v. Department of Energy (Docket No. PH07528010382)

KAUFFMAN, Kenneth v. Department of the Air Force (Docket No. PH07528010325)

KEITHAN, John F. v. Department of the Army (Docket No. PH531D8010293)

KINCHEON, Maudie v. Department of the Navy (Docket No. SF07528010451)

KITCHENS, Margaret I. v. Office of Personnel Management (Docket No. AT831L8010085)

KLEIN, James T. v. Department of Labor (Docket No. DC075209038)

KOONTZ, Kenneth A. v. Department of the Treasury (Docket No. DE07528010152)

LAMORGE, Frances W. v. Department of Agriculture (Docket No. BN075209027)

LARKIN, Jack v. Veterans Administration (Docket No. DA07528010189)

LARSON, John C. v. Office of Personnel Management (Docket No. DC08318010159)

LAUDATO, James E. v. Office of Personnel Management (Docket No. AT831L8110068)
 LINDGREN, Jack v. Office of Personnel Management (Docket No. SF831L8110151)
 LLORENS, Luis R. v. Department of the Air Force (Docket No. CH315H8110141)
 LUCAS, Russell C. v. Department of the Air Force (Docket No. SF7528010109)
 MACK, Catherine v. Department of Labor (Docket No. DC07528010271)
 MALONE, Elois v. Department of Health and Human Services (Docket No. NY07528010089)
 MARTON, Wiley W., M.D., v. Department of Health and Human Services (Docket No. DE315H8010154)
 MAXHAM, Richard M. v. Department of the Navy (Docket No. PH07528010417)
 MAY, Charles D. v. U.S. Postal Service (Docket No. AT07528010007)
 MCADORY, Joseph M. v. Department of Justice (Docket No. AT07528010202)
 MCGAHEY, Vernon F. v. Department of the Air Force (Docket No. DA07528010037)
 MITCHELL, John v. U.S. Postal Service (Docket No. CH075209100AD)
 MOSLEY, Sallie A. v. Department of Justice (Docket No. DC315H8010376)
 MURRAY, Charles W. v. Department of Defense, Defense Mapping Agency (Docket No. DA075209156)
 MURRAY, James S. v. Department of the Navy (Docket No. PH315H8010305)
 NEEF, Billy W. v. Department of the Air Force (Docket No. DE07528010078)
 NELSON, James W. v. Defense Mapping Agency (Docket No. SL075209064)
 PIERCE, Chadwick B. v. Department of the Treasury (Docket No. DC035109055)
 PLATA, Frank J. v. Department of Defense (Docket No. PH531D8010350)
 PRICE, Charles E. v. National Guard and Office of Personnel Management (Docket No. PH07528010275)
 RAFFERTY, Denis F. v. Department of the Treasury (Docket No. BN03538010064)
 RICHARDSON, Lenua v. Department of Justice, Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kansas (Docket No. SL315H8110056)
 ROBINSON, Diane T. v. Veterans Administration (Docket No. SF315H8010287)
 ROBINSON, Vestao v. Department of the Army (Docket No. SF075299068)
 ROGENMOSER, Barry v. Department of Agriculture (Docket No. NY315H8110017)
 SANDERS, Rogers v. Social Security Administration, Department of Health and Human Services (Docket No. DC075209155)
 SCHAFFER, Robert R. v. Department of Defense (Docket No. DC07528010150)

SCHMIDT, Betty M. v. Department of the Army (Docket No. SE07528010091)
 SCHOVENS, Mary L. v. Office of Personnel Management (Docket No. PH831L8010097)
 SPIDLE, Deborah A. v. Department of Justice (Docket No. PH04328010369)
 SPILMAN, Jane v. Office of Personnel Management (Docket No. PH831L8010327)
 STEELE, Paul J. v. General Services Administration (Docket No. NY315H99018)
 TANNONS, Hani I. v. Department of Army (Docket No. SF07528110331)
 THOMAS, Mark C. Guy P. Thompson v. Department of the Army (Docket No. AT07528010028)
 THOMPSON, Guy P. (SEE Thomas) (Docket No. AT07528010027)
 TORRES, Edward C. v. U.S. Postal Service (Docket No. DA07528010233)
 WAKELAND, Henry H. v. National Transportation Safety Board (Docket No. DC3518010157)
 WALDRON, John v. Office of Personnel Management (Docket No. DE831L8110010)
 WALLIN, Sandra v. Department of Housing and Urban Development (Docket No. SL315H09002)
 WILCOX, Richard A. v. The Arms Control and Disarmament Agency (Docket No. DC075299057)
 WILEY, Shelley R., Jr. v. U.S. Postal Service (Docket No. AT07528010220)
 WILKINS, Hugh D. v. Department of the Army (Docket No. DC07528010218)
 WIZI, George R. v. Department of the Treasury (Docket No. AT34438010270)
 WRIGHT, Maurice E. v. Federal Aviation Administration (Docket No. DC07528010413)

THE FOLLOWING INITIAL DECISIONS WERE REVERSED:

KAMER, Charles J. v. Department of the Navy (Docket No. SE07528010066)
 KIESER, Ralph F. v. Office of Personnel Management (Docket No. SL08318010040)
 MCDUFFIE, Carrell v. Department of the Air Force (Docket No. AT075209028)
 OVERTON, Lorine W. v. U.S. Department of the Treasury, Internal Revenue Service (Docket No. AT531D09098)
 PRUNEDA, Sandra J. v. Internal Revenue Service (Docket No. DA531D8010034)
 TAYLOR, Sandra v. Department of Housing and Urban Development (Docket No. SF03518010236)
 YORK, Leon A. v. U.S. Postal Service (Docket No. PH075209159)

**THE FOLLOWING INITIAL DECISIONS WERE
AFFIRMED OR AFFIRMED AS MODIFIED:**

CRAIGHEAD, Thomas A. v. Department Agriculture
(Docket No. AT07528010043)
GANTT, Dorothy v. Department of the Navy (Docket
No. DC07528010153)
HOLLIDAY, Harry F. v. Office of Personnel Manage-
ment (Docket No. NY08318010109)
LAPIDUS, Gabriel v. Government of the District of
Columbia (Docket No. DC035109093)
LEE, Reuben D. v. Department of the Navy (Docket
No. AT07528010067)
METZGER, Earl H., Jr. v. Department of Housing
and Urban Development (Docket No. AT035199009)
MITCHELL, William J., Jr., v. Department of the
Navy (Docket No. PH075209113)
ROBERTS, William H. v. Department of the Air Force
(Docket No. AT075209156)
SHELLEY, Grace M. v. Office of Personnel Manage-
ment (Docket No. AT083109006)
SORRELLS, Glen E. v. United States Postal Service
(Docket No. DA07528010066)
STARNES, Jerry M. v. Department of the Interior
(Docket No. SL035109006)
STROUP, Bob C. v. Department of the Air Force
(Docket No. AT34438010234)
ZIDELE, Israel v. Defense Logistics Agency (Docket
No. NY075209167)

**THE FOLLOWING ADDENDUM DECISION WAS
REVERSED**

SMALL, Robert H. v. Department of The Navy (Docket
No. BN07528090051)

**THE FOLLOWING CASES WERE REMANDED TO
FIELD OFFICES:**

ALMCRANTZ, Karl A. v. Office of Personnel Man-
agement (Docket No. SF831L8110457)
ARMSTRONG, William K. v. Department of the Navy
(Docket No. SE315H8010092)
BROWN, David H. v. U.S. Government Printing Of-
fice (Docket No. DC03518010027)
CARROLL, Ollie v. U.S. Postal Service (Docket No.
DC07528010097)
FREEMAN, Clifford G. v. United States Postal Service
(Docket No. SL07528110011)
JOHNSON, Hertha v. Office of Personnel Manage-
ment (Docket No. SF831L8110440)
JORDAN, William L. v. Office of Personnel Manage-
ment (Docket No. SF831L8110445)
MANTICK, Herbert W. v. Department of Housing and
Urban Development (Docket No. CH03518010052)

MINHAS, Khalid M. v. Department of Transporta-
tion (Docket No. DC315H8010250)
MORRIS, Lucile v. Veterans Administration (Docket
No. CH075209213)
PANTAGES, Spiros v. Department of the Navy
(Docket No. SF07528110064)
RUCKER, Jack L. v. Department of the Treasury
(Docket No. NY531D8010043)
URIARTE, Linda K. v. Department of Agriculture
(Docket No. SF315H09006)

THE FOLLOWING PETITIONS WERE DISMISSED:

ASPINWALL, Yules v. Veterans Administration
(Docket No. NY075209151)
CAHILL, Jerry L. v. U.S. Department of Agriculture
(Docket No. DE07528110034)
DROMS, Frank v. Department of the Navy (Docket
No. DC07528010247)
SCHLENKER, Arthur E. v. Department of the Trea-
sury Revenue Service (Docket No. DE075299032)

**THE FOLLOWING REQUESTS TO REOPEN AND
RECONSIDER CASES WERE DENIED:**

ABUBOT, Anselmo C. v. Office of Personnel Man-
agement (Docket No. CSA2028006)
CONER, Charles E. v. Office of Personnel Manage-
ment (Docket No. CSA1412169)

**THE BOARD ORDERED THE AGENCY TO SUBMIT
A BRIEF IN THE FOLLOWING CASE:**

SWARICK, William G. v. U.S. Postal Service (Docket
No. CH075209022)

THE FOLLOWING ORDER WAS AMENDED:

HOLT, Odis v. Office of Personnel Management
(Docket No. DA073109001)

**IN THE FOLLOWING CASE, THE PETITION FOR
REVIEW WAS DENIED, BUT THE CASE WAS
REOPENED, AND THE INITIAL DECISION WAS
MODIFIED:**

BROWN, Clarence (Docket No. NY531D8110081)

**IN THE FOLLOWING CASE, THE BOARD ORDERED
AFFIDAVITS TO BE SUBMITTED:**

COLSTON, Jon v. Department of the Army (Docket
No. CH075209151)

**THE FOLLOWING CASES WERE ASSIGNED TO
ADMINISTRATIVE LAW JUDGES:**

ARONSON, Arthur J., Appellant v. Social Security
Administration, Department of Health and Human
Services and Office of Personnel Management,
Respondents (Docket No. HQ075218110056)

**A REQUEST TO FILE AN AMICUS CURIAE BRIEF
AND A MOTION TO RESPOND WERE GRANTED
IN THE FOLLOWING CASE:**

LAWRENCE, Robert V. v. Department of the Army
(Docket No. DE075299033)

**THE BOARD EXTENDED THE DATE FOR FILING
BRIEFS IN THE FOLLOWING CASE:**

SIMS, Nathaniel v. District of Columbia Government
(Docket No. DC12068110051)

THE FOLLOWING CASE WAS REOPENED:

GIBSON, Robert, Jr. v. Department of Justice (Docket
No. NY07528090116)

**THE FOLLOWING CASES INVOLVED THE ACTING
SPECIAL COUNSEL:**

(NOTE: EACH ENTRY MAY REPRESENT MORE
THAN ONE ACTION)

ACTING SPECIAL COUNSEL v. Department of State
(Docket No. HQ12068110004)

ACTING SPECIAL COUNSEL v. Department of the
Treasury, Internal Revenue Service (Docket No.
HQ12088110054)

ACTING SPECIAL COUNSEL v. Department of the
Army (Docket No. HQ12068110017)

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Decisions of the United States Merit Systems Protection Board (Volumes I and II) and *Index to Decisions of the United States Merit Systems Protection Board* are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at \$27 for the three-volume set; Stock No. 062-000-00002-3. Covering the period of January 11, 1979, through July 22, 1980, these volumes consist of final actions taken by the Board after the issuance of an initial decision in an appeal from an agency action, Board actions in cases where it has original jurisdiction, and precedential interlocutory actions. In most cases, the preceding initial or recommended decision is included. The cases are indexed in the accompanying multi-part index volume.

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DEFINITIONS:

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Field Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB field offices.

Initial Decision—the field office decision made by the presiding official in response to petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board field office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board field office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

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